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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ARTHUR RAY WASHINGTON, Defendant and Appellant.	H036756 (Santa Clara County Super. Ct. No. CC933686)

In a negotiated disposition, defendant Arthur Ray Washington pleaded no contest to six counts of forcible lewd conduct on a child under 14 (Pen. Code, § 288, subd. (b)(1))[1] in exchange for a 44-year sentence and dismissal of numerous remaining counts. Before sentencing, he moved to withdraw his pleas (§ 1018), arguing that his trial counsel and the trial court had affirmatively misadvised him that he would have "no exposure whatsoever" to civil commitment as a sexually violent predator (SVP) as a consequence of his pleas. Had he known he could face SVP commitment, he asserted, he would not have pleaded no contest but would have instead insisted on proceeding to trial. The trial court denied defendant's motion and imposed the agreed-upon prison term.

On appeal, defendant contends that the denial of his motion was an abuse of discretion. He claims the judgment must be reversed and the case remanded with an

[1] Further statutory references are to the Penal Code unless otherwise noted.

instruction to set aside his pleas because the record "clearly and convincingly establishes that [he] would have gone to trial rather than accept a plea bargained 44[-]year sentence had he known of the SVP exposure at the end of it." We conclude that the trial court applied the wrong prejudice standard. We reverse the judgment and direct the court, on remand, to reconsider defendant's motion under the proper standard.

I. Background[2]

Defendant began sexually abusing his daughter R. when she was four. When R. was about 10, she told her mother about the abuse, and her mother confronted defendant. The abuse stopped for about seven months but then resumed. When R. was about 13, she reported the abuse to her grandmother. Her grandmother called the police, and defendant was arrested.

Testifying at defendant's preliminary examination, R. told the court, "[T]his is very embarrassing, so I'm sorry, but my dad used to perform oral sex on my vagina," and "[h]e licked my vagina and [I] sucked his penis . . . ." This had happened "[m]aybe 30 times or more," R. estimated.

Defendant was charged by information with three counts of aggravated sexual assault on a child under 14 by means of forced oral copulation (§§ 269, 288a), four counts of forcible lewd conduct on a child under 14 (§ 288, subd. (b)(1)), and one count of lewd conduct on a child under 14 (§ 288, subd. (a)).

At a change of plea hearing on November 13, 2009, the court noted that the parties had agreed to a negotiated disposition: the information would be amended to add two more section 288, subdivision (b)(1) counts, and defendant would plead guilty or no

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[2] Because defendant pleaded no contest, we take the facts from the transcript of the preliminary examination. The parties stipulated and the trial court found that the police report and the preliminary examination transcript provided a factual basis for defendant's pleas.

contest to six such counts in exchange for a prison term of "44 years top bottom . . . at 85 percent" and dismissal of the remaining counts. This was "in lieu of a sentence of 45 to life plus 40 years all done at a minimum . . . of 85 years . . . ."

The court asked counsel, "Is there any SVP exposure on this case at all?" "There's only one victim," defendant's trial counsel replied. The court then stated that "[u]nder the laws of this state as it currently exists right now there is no exposure whatsoever to what is called a sexually violent predator commitment . . . . Right now I believe it requires two alleged victims separately done. That would entail the possibility of a life commitment in the Department of Mental Health for treatment." Defendant entered his pleas, and the court set the matter for sentencing.

A few days before the sentencing hearing, the district attorney notified the court and defense counsel that the existence of a single victim can trigger an inquiry into whether a defendant should be committed as an SVP.

At the sentencing hearing on January 29, 2010, defense counsel told the court, "I've explained the situation to [defendant], and my suggestion to him was that the Court would give him the corrected admonition with respect to the SVP. But he'd like to take a couple of weeks to consider his options -- [¶] . . . [¶] . . . -- and come back to court. I think he's leaning toward going with the status quo, but it could be wise for him." The court then told defendant that it had advised him incorrectly: "[I]t was probably an over abundance [*sic*] of caution on my part in raising that issue at all, and I was dead wrong . . . . One incident could be enough to trigger an inquiry, testing, and potential SVP holding, which would constitute a life sentence." Explaining that the determination would be made, if at all, at the end of his prison term, the court told defendant, "I don't know whether they'll do it. . . . I don't know what the law is going to be." The court suggested that defendant take two to three weeks to decide what he wanted to do.

"Question?" the court asked. "Yeah, I have a question," defendant responded. He explained that he had been offered a 32-year deal before the preliminary examination, but

he had been given "less than an hour" to make a decision and "didn't have time to speak with my family or anyone." "And I was wanting to ask if that could be reinstated . . . ." The court replied that it could not reinstate the People's offer.

Providing background for the court, the district attorney explained that he made a 36-year offer before the preliminary examination to spare the victim the anguish of testifying. "And I spoke to [defendant's] wife . . . and we talked about how things could get worse and usually do get worse after the hearing . . . . [¶] I know there was some discussion between counsel and [defendant], and there was a counteroffer made of 28 years. . . . And we agreed on 32 [years] . . . take it or leave it or we're going to prelim. [¶] I know there was quite a bit of time where [defendant] had an opportunity to talk to . . . his wife, here in the courtroom alone. . . . And after that discussion, whether it was 30 minutes or whatever, I'm not sure, the decision was made that he didn't want the 32 years and that's when you put the victim on the stand."

Continuing, the district attorney noted that shortly after the preliminary examination but before defendant's arraignment on the information, defendant's trial counsel called to ask, "Can you reoffer what you offered . . . at prelim? Can we get a determinant [*sic*] term so we don't have to hit Department 24 facing life, multiple life counts?" It was then that the district attorney made the "extraordinary offer" of a determinate 44-year term, which defendant accepted.

The district attorney made it clear that any hearing to withdraw defendant's pleas would be a contested one and that if defendant withdrew his pleas, "the defense should not expect to have this 44 years back, and [defendant will be] back to looking at multiple life counts . . . ."

At a hearing on February 19, 2010, defendant's counsel sought another continuance. He represented that if defendant had been offered a 32-year deal after the preliminary examination, "he still would have taken that offer. So it's more likely than

not that . . . he is not going to change his mind . . . ." But counsel wanted to consult someone with "more knowledge of this SVP area."

On March 25, 2010, defendant's trial counsel advised the court that defendant wanted to withdraw his pleas because of an "issue about the SVP advisement." Told that the People would want to examine him, counsel asked the court to appoint new counsel for defendant. On April 7, 2010, the court appointed the public defender to represent defendant.

In November or December 2010, the district attorney offered a 36-year plea bargain. Defendant rejected it.

On January 3, 2011, the court heard evidence on defendant's motion to withdraw his pleas. Defendant testified on direct examination that he understood the plea bargain to mean he would serve 44 years, and "[t]hat would be it." He would not have accepted the plea bargain had he known it might expose him to commitment as an SVP, because it was "very important" and "a priority" for him to go home to family "at some point in time." He felt "crushed" and "deceived" when he learned he might face commitment as an SVP.

Defendant insisted on cross-examination that he had not been willing to accept *any* plea bargain *before* the preliminary examination and had not authorized his trial counsel to negotiate one. He acknowledged accepting the 44-year deal "within a couple of weeks" after the preliminary examination. He knew when he accepted that deal that he was charged with multiple crimes that carried life sentences. He knew how his daughter would answer questions on direct and cross-examination, and he had seen "how she got emotional" at the preliminary examination when she accused him of molesting her. He was also aware that the prosecution "had caught wind of" his juvenile history, interviewed his sister, and learned that he had had sexual intercourse with her when she was 11. He knew there was "a good chance" that if he did not accept a deal, a jury "could very well" hear he had admitted those offenses to his juvenile probation officer. It

was "fair to say," defendant conceded, that when he entered his pleas, he did not like his chances at trial. The "real reason" he accepted the 44-year deal was "[t]o take life counts off the table."

Defendant described his state of mind after the court gave him the corrected SVP information as "very cloudy." "So at that point in time, I was still uninformed and that's my answer." He conceded on recross-examination that "the first thing that popped out . . . was not, Judge, I'm unclear about SVP" or "Judge, I'm uninformed. Help me out here. I don't understand." Instead, the "the first thing out of [his] mouth" was that he wanted the 32-year offer reinstated. He had not even mentioned the SVP issue.

Defendant's trial counsel also testified at the hearing. He recalled that defendant had authorized him both before and after the preliminary examination to negotiate a disposition. He recalled communicating various offers to defendant. *After* the preliminary examination, defendant asked him to "retrieve or recover" the People's 32-year offer, but by then, the district attorney would not agree to less than a 44-year term. Before defendant accepted the offer, the court authorized defendant's wife "to come into the courtroom and discuss it with him." Counsel recommended against accepting the 44-year plea bargain; at the time, he was unaware that defendant had had sexual intercourse with his 11-year-old sister, and he was also unaware of "troubling" allegations of force against her.

Counsel acknowledged that he had not discussed the SVP laws with defendant "[in] any significant depth" before he entered his pleas. He had, however, begun correcting the misinformation when he learned that defendant had been misadvised. He told defendant the existence of a single victim could trigger a commitment petition. He advised him that commitment as an SVP was a civil commitment and not a foregone conclusion. Instead, defendant "could have a trial on it," after which he would be found eligible or not eligible. Counsel "would have made it clear" defendant was probably going to receive new counsel who would properly advise him.

Counsel acknowledged that defendant's "immediate concern," upon receiving the corrected advisement on January 29, 2010, was to have the 32-year deal reinstated. Asked about his February 19, 2010 representations to the court that it was "unlikely" that defendant would withdraw his pleas and that he would have accepted the 32-year deal even had he been correctly advised, counsel said, "I don't think I would have committed [defendant] to that without having conferred with him."

The court denied the motion. It found "both a Court error and a counsel error" had "clearly" been made. "[C]ritical" to the court's analysis and "what the case turn[ed] on" was that when defendant received corrected information at the January 29, 2010 hearing, his "immediate" response had "nothing to do with the SVP [issue] but rather getting a smaller amount of time." Defendant had been given "a fair chance" to object "immediately" and to ask "immediately" to withdraw his plea "focusing on the SVP consequences," but he had not done so. The court also found that defendant had not been prejudiced by the misadvisement. "The question would be in the Court's opinion would there have been a different result on a triable issue in this case, and the Court believes that based on the [Evidence Code section] 1108 evidence that was discussed and the facts and circumstances of this particular case, there would be no difference. Therefore, I find no prejudice involved in this particular set of facts."

There was "a separate question," the court continued, about whether the SVP inquiry was a direct or a collateral consequence of the plea, but "I don't believe that this is a forum for addressing that. What I do believe is that the Court having made it an issue and [defendant's trial counsel] having discussed it, the question does surface on the credibility of the defendant and the prejudice that could have resulted; and I'm making a finding that in neither situation has the defense persuaded this Court that the plea should be set aside."

Defendant filed a timely notice of appeal and obtained a certificate of probable cause.

II. Discussion

Defendant claims the court abused its discretion in denying his motion, because the record "clearly and convincingly establishes that [he] would have gone to trial rather than accept a plea bargained 44-year sentence had he known of the SVP exposure at the end of it."

A defendant may move to withdraw his or her plea at any time before judgment on a showing of good cause. (§ 1018.) Mistake, ignorance, or any other factor overcoming the exercise of free judgment can constitute good cause for the withdrawal of a guilty or no contest plea, but good cause must be shown by clear and convincing evidence. (*People v. Wharton* (1991) 53 Cal.3d 522, 585 (*Wharton*); *People v. Cruz* (1974) 12 Cal.3d 562, 566.) "A plea may not be withdrawn simply because a defendant has changed his mind." (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.)

A defendant's lack of "knowledge of or reason to suspect severe collateral consequences"[3] can provide good cause for withdrawal of a plea. (*People v. Superior Court (Giron)* (1974) 11 Cal.3d 793, 798 (*Giron*).) In such cases, however, " 'the sentencing court must determine whether the error prejudiced the defendant, i.e., whether it is "reasonably probable" the defendant would not have pleaded guilty if properly advised.' [Citations.]" (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 210 (*Zamudio*).) A defendant's self-serving assertion that he would not have entered a plea but would have instead insisted on proceeding to trial "must be corroborated independently by objective evidence." (*In re Alvernaz* (1992) 2 Cal.4th 924, 938 [explaining that a contrary rule "would lead to an unchecked flow of easily fabricated

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[3] "A collateral consequence is one which does not 'inexorably follow' from a conviction of the offense involved in the plea." (*People v. Crosby* (1992) 3 Cal.App.4th 1352, 1355.) The possibility of SVP commitment is a collateral consequence of a guilty or no contest plea, "analogous to deportation" proceedings. (*People v. Moore* (1998) 69 Cal.App.4th 626, 632-633.)

claims"]; *In re Resendiz* (2001) 25 Cal.4th 230, 253-254, abrogated on another ground in *Padilla v. Kentucky* (2010) __ U.S. __ [130 S.Ct. 1473, 1484].)

We review the trial court's denial of a motion to withdraw a plea for abuse of discretion. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254 (*Fairbank*); *Giron*, *supra*, 11 Cal.3d at p. 796.) In making that determination, we adopt the trial court's factual findings if supported by substantial evidence. (*Fairbank*, at p. 1254.) We "'will not disturb the denial of a motion unless the abuse is clearly demonstrated.'" (*Wharton*, *supra*, 53 Cal.3d at p. 585.) "A discretionary order based on the application of improper criteria or incorrect legal assumptions is *not* an exercise of *informed* discretion and is subject to reversal even though there may be substantial evidence to support that order." (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 26 (*F.T.*); *In re Charlisse C.* (2008) 45 Cal.4th 145, 161 (*Charlisse C.*).)

Here, the court cited a lack of prejudice on "this particular set of facts" as a reason for denying defendant's motion, explaining that "[t]he question would be in the Court's opinion would there have been a different result on a triable issue in this case" had defendant been correctly advised. That is not the proper standard for determining prejudice when a defendant seeks to withdraw a plea on the ground that he or she was unaware of its collateral consequences. As the California Supreme Court explained in *In re Moser* (1993) 6 Cal.4th 342, 345, "a defendant who has pleaded guilty after receiving inadequate or erroneous advice from the trial court with regard to the potential consequences of a plea generally is entitled to obtain relief only by establishing that he or she was prejudiced by the erroneous advice, *i.e., by establishing . . . that but for the trial court's erroneous advice . . . , the defendant would not have entered the guilty plea.*" (*Ibid.*, italics added; *Zamudio*, *supra*, 23 Cal.4th at pp. 198, 210 ["'[n]ormally a motion to vacate a plea based on misadvisement or omission of a collateral consequence requires the defendant to demonstrate that he would not have entered into the plea had he known of the consequence.'"].) Since the court's statement on the record indicates that it

applied the wrong prejudice standard, its finding that defendant was not prejudiced cannot support denial of the motion. (*F.T.*, *supra*, 194 Cal.App.4th at p. 26; *Charlisse C.*, *supra*, 45 Cal.4th at p. 159 ["a disposition that rests on an error of law constitutes an abuse of discretion."].)

We note that the court also said, "What I do believe is that the Court having made it an issue and [defendant's trial counsel] having discussed it, *the question does surface on the credibility of the defendant* and the prejudice that could have resulted; and I'm making a finding that in neither situation has the defense persuaded this Court that the plea should be set aside." (Italics added.) We cannot discern whether this perplexing statement reflects an alternative basis for the court's ruling. Given the error that was made here, we cannot say that application of the wrong prejudice standard was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 835-836.)

III. Disposition

The judgment is reversed, and the case is remanded to the trial court for reconsideration of defendant's motion under the proper standard.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

_____
Duffy, J.*

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.